No. 82-1050

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

ROBERT H. MATHEWS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

REPLY BRIEF FOR THE APPELLANT

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In their Motion to Affirm, appellees argue, in the alternative, that Section 334(g)(1) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. IV) 402 note, either does not incorporate a gender-based classification or violates equal protection constraints if it does. They further assert that the district court properly concluded that Section 334(g)'s severability clause constitutes an impermissible intrusion upon the power of the federal courts. None of these contentions is sound, and this case plainly warrants plenary review by this Court.

1. Appellee's "threshold thesis" is that "Congress intended [Section 334(g)(1)] to protect the reliance interests of soon to retire men and women without reference to a gender-based dependency test" (Mot. to Aff. 6). Appellees assert (*id.* at 7) that the Court should adopt this construction of Section 334(g)(1) in order to avoid the constitutional issues presented by this case. But "the maxim that statutes should be construed to avoid constitutional questions offers no assistance here. This ' "cardinal principle" of statutory construction * * * is appropriate only when [an alternative interpretation] is "fairly possible" '

from the language of the statute." *United States* v. *Batchelder*, 442 U.S. 114, 122 (1979) (quoting *Swain* v. *Pressley*, 430 U.S. 372, 378 n.11 (1977)). Appellees' construction of Section 334(g) is not "fairly possible" because the plain language of the statute, as well as its legislative history, evidences Congress' intent to incorporate a gender-based dependency test into the legislation.

Section 334(g) expressly states that, in order to qualify for exemption from the pension offset provisions of the Social Security Amendments of 1977, a claimant must be eligible for spousal benefits under the law "as it was in effect and being administered in January 1977" (Section 334(g)(1)(B), 42 U.S.C. (Supp. IV) 402 note). In January 1977, the Social Security Act required men, but not women, to prove that they were dependent on their spouses for at least one-half of their support prior to receiving spousal benefits. Compare 42 U.S.C. 402(b) with 42 U.S.C. 402(c).

Contrary to appellees' assertion (Mot. to Aff. 8-9), the legislative history of Section 334(g) unquestionably demonstrates Congress' intent to incorporate a gender-based one-half support requirement into the pension offset exception. As explained in our Jurisdictional Statement (at 10-11), Congress enacted the pension offset provisions of the Social Security Amendments of 1977 to eliminate the payment of spousal benefits to retired male government workers who, in most instances, were not dependent upon their spouses but who nevertheless were eligible for benefits under this Court's decision in *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). S. Rep. No. 95-572, 95th Cong., 1st Sess. 27-28 (1977); *President Carter's Social Security Proposals: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. 158 (1977). The sole ration-

ale presented by Congress for Section 334(g)'s exception to these pension offset provisions was to protect the reliance interests of "large numbers of women, especially widows in their late fifties * * *, whose retirement income was planned for on the assumption of the availability of full wife's or widow's benefits under social security" (H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 71-72 (1977); S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess. 71-72 (1977)). Thus, Congress enacted Section 334(g) primarily to protect the interests of "large numbers of women" (H.R. Conf. Rep., No. 95-837, *supra*, at 71-72; S. Conf. Rep. No. 95-612, *supra*, at 71-72), and the pension offset exception accordingly was limited to those persons eligible for spousal benefits under the Act as it was "in effect and being administered in January 1977" (Section 334(g)(1)(B), 42 U.S.C. (Supp. IV) 402 note). See 123 Cong. Rec. H12990-H12991 (daily ed. Dec. 15, 1977) (remarks of Rep. Harris) ("The apparent rationale for the offset provision is that men who receive public pensions will get some sort of a 'windfall' if they are allowed to receive social security dependent's benefits, and that since they may not be 'truly dependent,' they must be able to 'prove' their dependency in order to get a permanent exemption from the offset provision").

Congress' recent enactment of a new pension offset exception underscores the fact that Section 334(g) requires men, but not women, to prove dependency in order to claim the benefits of the section. Section 334(g) expired on December 1, 1982. Section 334(g)(1)(A), 42 U.S.C. (Supp. IV) 402 note. On January 12, 1983, President Reagan signed Pub. L. No. 97-455, 96 Stat. 2497, which contains a new exception to the pension offset provisions of the Social Security Amendments of 1977. Section 7 (96 Stat. 2501). The new provision exempts an individual who

becomes eligible for a public pension prior to July 1983 from the pension offset provisions of the 1977 legislation, so long as "that individual is dependent upon his or her spouse for one-half support." H.R. Conf. Rep. No. 97-985, 97th Cong., 2d Sess. 13 (1982). The House Conference Report, in comparing the new provision with Section 334(g), notes that the express terms of Section 334(g) provide an exception only for those claimants who meet "the requirements for entitlement as they were in effect and being administered in January 1977" (*ibid.*). The law in 1977, the report states, "required men, but not women, to prove they were dependent on their spouses for at least one-half of their support" (*ibid.*). The new pension offset exception, by contrast, applies the one-half support test to "both men and women" (*ibid.*). Thus, the legislative history of the most recent pension offset exception demonstrates beyond cavil that Section 334(g) incorporates a gender-based support requirement.[1]

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[1] Neither the fact that Section 334(g) expired on December 1, 1982, nor the enactment of Pub. L. No. 97-455 should affect this Court's decision to hear the appeal in this case. Although Section 334(g) expired on December 1, 1982, the section, by its express terms, still applies to claimants filing after November 1982 so long as they would have been eligible for a government pension prior to December 1982 had they made proper application for such benefits. Section 334(g)(2), 42 U.S.C. (Supp. IV) 402 note. Benefits payable after December 1982 to claimants satisfying the offset exception prior to that date are not subject to the offset. See J.S. 11 n.6. Section 7 (96 Stat. 2501), moreover, does not replace Section 334(g), but merely provides a new pension offset exception, which expires in July 1983, for any person who can show dependency on his or her spouse. Women who qualified for a government pension prior to December 1982 will undoubtedly prefer to invoke Section 334(g), inasmuch as it does not require a showing of dependency.

In the face of the clear language of Section 334(g) and its legislative history, appellees assert that spousal benefits were administered without regard to dependency in January 1977 and that, in light of *Califano* v. *Goldfarb*, *supra*, Congress could not have intended to incorporate a gender-based dependency test into the pension offset exception (Mot. to Aff. 9-11). Neither contention is persuasive.

Appellees' contention (Mot. to Aff. 9) that the law "in effect" in January 1977 did not include a gender-based dependency test is erroneous. Assuming, for the sake of argument, that the Social Security Claims Manual in January 1977 did provide that a gender-based dependency test would not be enforced pending the outcome of the *Goldfarb* litigation, there is no reason to suppose that Congress was aware of this fact when it enacted Section 334(g). When Congress expressly provided that Section 334(g) would apply only to those persons eligible for spousal benefits under the law "as it was in effect and being administered in January 1977," Congress clearly meant the law as written—even if that law was ineffective because of a constitutional defect. There would have been no other reason to choose the January 1977 date.[2] In any event, the Social Security Claims Manual clearly demonstrates that the law "in effect" in January 1977 included a gender-based dependency test for spousal

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[2] As the district court in *Rosofsky* v. *Schweiker*, 523 F. Supp. 1180, 1184 (E.D.N.Y. 1981), prob. juris. noted, No. 81-1551 (May 3, 1982), appeal dismissed (June 22, 1982), noted in rejecting the exact argument submitted by appellees: "[T]o construe the 1977 amendments as [appellees] urge[ ] would be to disregard the manifest purpose of Congress to limit the exception to those entitled to spousal benefits under the Act as written in January 1977 and not to include those who received benefits as a result of the courts' striking down of the support requirement. The court is not required to read statutory language so literally as to defeat its aim."

benefits. The manual noted that, while the dependency test's constitutionality had been challenged, "*the law remains unchanged* and no payment can be made until a final decision has been rendered on the constitutionality of the one-half support requirement" (Social Security Claims Manual Transmittal No. 3844 (July 14, 1976) (emphasis added)). Thus, although appellees imply otherwise (Mot. to Aff. 9-10), the spousal benefits law in January 1977 was "being administered" in accordance with the requirements set forth by Congress, and no spousal benefits were being paid to male claimants who failed to demonstrate one-half dependency on their wives.

Appellees assert that "the most persuasive statutory construction approach is to interpret the exception clause in light of the *Goldfarb* decision" (Mot. to Aff. 10). We agree. "There should be no question that Congress was aware of this decision when it enacted the government pension offset provision and the accompanying exception clause" (*ibid.*). Indeed, it was precisely because of the *Goldfarb* decision that Congress restricted the applicability of Section 334(g) solely to those persons who were eligible for spousal benefits under the law as it was "in effect and being administered in January 1977" (Section 334(g)(1)(B), 42 U.S.C. (Supp. IV) 402 note). "If Congress had wished to provide the exception to male applicants without regard to dependency, it would certainly have selected a control date after the March 1977 Supreme Court decisions, not before." *Rosofsky* v. *Schweiker*, *supra*, 523 F. Supp. at 1185.[3]

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[3] *Gebbie* v. *United States Railroad Retirement Board*, 631 F.2d 512 (7th Cir. 1980), relied upon by appellees (Mot. to Aff. 10), is not to the contrary. In that case, Congress had provided that dual benefits under both the railroad retirement and social security programs could be paid if the applicant was entitled to social security benefits under the law

2. Appellees next argue (Mot. to Aff. 11-14) that, assuming Congress did intend to apply a one-half support test to husbands under the pension offset exception, Section 334(g) fails to meet constitutional standards.[4] In our Jurisdictional Statement, we argue that Congress "enacted the pension offset exception in order to protect those retired or soon-to-be retired spouses who reasonably relied on the terms of the pre-*Goldfarb* spousal benefits provisions" (J.S. 15). We further suggest that the exception is substantially related to the achievement of "the important governmental objective of protecting reliant spouses against financial hardships that could result from an unexpected reduction of spousal benefits" (J.S. 17). Appellees assert that this is an insufficient justification for Section 334(g)'s incorporation of a dependency test because it fails to protect the reliance interests of "the 29,026 males claiming entitlement to spousal benefits after the *Goldfarb* decision but prior to the effective date of the Social Security Amendments of 1977" (Mot. to Aff. 13).

The short answer to appellees' argument on this point is that neither Section 334(g) nor the Secretary's construction of the section adversely affects the

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"as in effect on December 31, 1974" (45 U.S.C. 231b(h)(3)). The court of appeals concluded that this language did not insulate social security benefits from the impact of the *Goldfarb* decision. Unlike the present case, however, there was no evidence in *Gebbie* that Congress selected December 31, 1974, specifically to adopt the language of the Act as it read prior to *Goldfarb*.

[4] A gender-based classification will be upheld if it "serves 'important governmental objectives and * * * the discriminatory means employed' are 'substantially related to the achievement of those objectives' " (*Mississippi University for Women* v. *Hogan*, No. 81-406 (July 1, 1982), slip op. 6 (quoting *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. 142, 150 (1980)).

legitimate reliance interests of the class specified by appellees. The pension offset provisions of the Social Security Amendments of 1977 apply only to those persons whose "applications [are] filed in or after the month in which this Act is enacted" (Section 334(f), 42 U.S.C. (Supp. IV) 402 note). Hence, the husbands who filed for spousal benefits prior to and including November 1977 are not affected by the 1977 legislation and are not subject to the pension offset. Therefore, because those husbands are not subject to a pension offset, they are eligible for full spousal benefits whether or not they meet the one-half dependency test set forth in Section 334(g). Thus, the only class of persons adversely affected by Section 334(g)'s dependency test are those nondependent husbands who applied for spousal benefits after the effective date of the Social Security Amendments of 1977. While this class of social security claimants may have been disappointed by the 1977 legislation, the class members can hardly claim that "equal protection requires" protection of their "reliance interests" (Mot. to Aff. 13). Appellees may have hoped for the continued windfall payment of full spousal benefits to nondependent husbands, but they certainly have no constitutional claim to such payments.

3. Appellees argue that the district court properly invalidated Section 334(g)'s severability clause because it represents unconstitutional "interference with the judicial function" (Mot. to Aff. 15). This novel contention is plainly incorrect.

Appellees insist that the "remedy for an equal protection violation is to extend the benefits of the statute to the excluded class" (Mot. to Aff. 14 (footnote omitted)) because "any person whose rights under the Constitution are violated is entitled to an adequate remedy for the violation" (*id.* at 15). These assertions are such gross oversimplifications that

to state them is almost sufficient to refute them. This Court has never implied that the extension of benefits to an excluded class is the automatic remedy for an underinclusive statute (see *Califano* v. *Westcott*, 443 U.S. 76, 89-91 (1979)), and not every person whose rights are infringed is entitled to an "adequate remedy" in court (interpreted by appellees here as the payment of spousal benefits) (Mot. to Aff. 15-16).[5] Although the Court has never elaborated "the conditions under which invalidation rather than extension of an under-inclusive federal benefits statute should be ordered" (*Califano* v. *Westcott*, *supra*, 443 U.S. at 90), the severability clause in this case presents a compelling argument for invalidation, rather than extension, of Section 334(g).

Section 334(g)(3) provides, in the clearest terms, that "[i]f any provision of [the pension offset exception], or the application thereof to any person or circumstance, is held invalid, the remainder of [the pension offset provisions] shall not be affected thereby, but the application of [the pension offset exception] to any other persons or circumstances shall also be considered invalid" (Section 334(g)(3), 42 U.S.C. (Supp. IV) 402 note). The clause plainly expresses Congress' intent that "if [Section 334(g)] is found invalid the pension-offset as passed by the Senate would not be affected, and the application of the exception clause would not be broadened to include persons or circumstances that are not included within

[5] Indeed, the doctrine of sovereign immunity bars a damages remedy against the United States for violation of the Due Process Clause of the Fifth Amendment. See *United States* v. *Testan*, 424 U.S. 392, 399-407 (1976). None of the cases cited by appellees (Mot. to Aff. 15) in support of their "adequate remedy" argument involved a suit against the federal government.

it." H.R. Conf. Rep. No. 95-837, *supra*, at 71-72; S. Conf. Rep. No. 95-612, *supra*, at 71-72. Section 334 (g)(3) is, in effect, a "nonseverability" clause, evidencing " 'that the Legislature would not have enacted those provisions [of the pension offset exception] which are within its power, independently of that which is not.' " *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (per curiam) (quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932)). This unambiguous indication of congressional intent must be given full effect by the courts. *Brookins* v. *O'Bannon*, No. 82-1380 (3d Cir. Feb. 4, 1983), slip op. 13-16.[6]

Deferring to the clear legislative intent evidenced in Section 334(g)(3) does not, as appellees claim, "impermissibly impede[] the federal courts from redressing a constitution[al] violation" (Mot. to Aff. 16). Appellees are not constitutionally entitled to the payment of unreduced spousal benefits. Rather, they are entitled to legislative treatment that comports with the dictates of the Due Process Clause. If appellees succeed on their claim that Section 334(g) unlawfully distinguishes between classes of similarly situated individuals, this Court must apply the statute's unambiguous severability clause and invalidate the entire section. Congress has expressed its intent to deny the benefits of Section 334(g) to everyone if the statute cannot be limited to those who Congress believed to be most deserving of the benefits. This result, moreover, gives appellees more "than the dubious satisfaction of seeing wives and dependent hus-

[6] In *Brookins* v. *O'Bannon*, *supra*, slip op. 15, the Third Circuit rejected the contention that a nonseverability clause in a state welfare statute was an unlawful burden on the right to judicial redress because the clause "does no more than express the legislature's intention to repeal [the statute] unless [it] is enforceable."

bands lose their Social Security benefits" (Mot. to Aff. 16). It accomplishes all that appellees claim the Constitution requires—equal treatment.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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